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No. 85-506

In The

Supreme Court of the United States

October Term, 1985

PETER A. ASCANI, SR., INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF DAVID NATHAN ASCANI, PETER A. ASCANI, JR., ANNA SCHMIT, DARIUS ASCANI, JESSE ASCANI, MERCEDES REINERTH AND DARLEEN BOYLE

Petitioners

VERSUS

DARRELL HUGHES AND TERRENCE DUFFY, INDIVIDUALLY AND IN THEIR CAPACITIES AS OFFICERS OF THE NEW ORLEANS POLICE DEPARTMENT, HENRY MORRIS, INDIVIDUALLY AND IN HIS CAPACITY AS CHIEF OF POLICE OF THE NEW ORLEANS POLICE DEPARTMENT, THE CITY OF NEW ORLEANS AND TRANSIT CASUALTY

Respondents

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

I. THE ESTATE OF DAVID NATHAN ASCANI DOES NOT HAVE A CAUSE OR RIGHT OR ACTION AGAINST RESPONDENTS.

A. THE ESTATE OF DAVID NATHAN ASCANI DOES NOT HAVE A RIGHT OF ACTION UNDER LOUISIANA OR FEDERAL LAW.

B. THE ESTATE OF DAVID NATHAN ASCANI DOES NOT HAVE A CAUSE OF ACTION UNDER LOUISIANA LAW OR A CLAIM UNDER FEDERAL LAW.

II. THE SIBLINGS OF DAVID NATHAN ASCANI DO NOT POSSESS A CLAIM FOR LOSS OF ASSOCIATION WITH THEIR BROTHER.

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TABLE OF FEDERAL AND STATE STATUTES

1. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in action at law, suit in equity, or other proper proceeding for redress . . ." 42 U.S.C. Section 1983. ..... 2, 4, 6, 7, 8, 9, 10, 12

2. "The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title (Title 42) . . . shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified, and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cases is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to govern the said courts in the trial and disposition of the cause . . ." 42 U.S.C. Section 1988. ..... 2, 3, 4, 8, 10

3. "A. Every act whatever of man that causes damage to another obligates him by whose fault it happened to repair it.

   B. Damages may include loss of consortium, service, and society, and shall be recoverable by the same

respective categories of persons who would have had a cause of action for wrongful death of an injured person.

C. (1) The right to recover damages to property caused by an offense or quasi-offense is a property right which, on the death of the obligee, is inherited by his legal, instituted or irregular heirs, subject to the community rights of the surviving spouse.

(2) As used in this Paragraph, property damages may include expenses or monetary obligations necessarily incurred by the obligee on account of such offense or quasi-offense; however, if the obligee is survived by any beneficiary enumerated in the following Paragraph of this Article, such expenses or obligations shall be recoverable by said beneficiaries.

D. (1) The right to recover all other damages caused by an offense or quasi-offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of:

(a) The surviving spouse and child or children of the deceased, or either such spouse or such child or children;

(b) The surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and

(c) The surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving.

(2) The survivors in whose favor this right of action survives may also recover the damages which

they sustained through the wrongful death of the deceased.

(3) A right to recover damages under the provisions of this Paragraph is a property right which, on the death of the survivor in whose favor the right of action survived, is inherited by his legal, instituted, or irregular heirs, whether suit has been instituted thereon by the survivor or not.

E. As used in this Article, the words 'child', 'brother', 'sister', 'father', and 'mother' include a child, brother, sister, father and mother by adoption, respectively." La. Civil Code art. 2315. ..... passim

4. "An action does not abate on the death of a party. The only exception to this rule is an action to enforce a right or obligation which is strictly personal." Louisiana Code of Civil Procedure art. 428. 7

5. "When a party dies during the pendency of an action which is not extinguished by his death, his legal successor may have himself substituted for the deceased party, on ex parte written motion supported by proof of his quality. As used in Articles 801 through 804, 'legal successor' means:

(1) 'The survivors designated in Article 2315 of the Civil Code, if the action survives in their favor . . .' " Louisiana Code of Civil Procedure art. 801. 7

6. "All specifications or assignments for error must be briefed. The Court may consider as abandoned any specification or assignment of error which has not been briefed." Louisiana Rules of Court, Uniform Rules, Courts of Appeal 2-12.4. 11

STATEMENT OF THE CASE

Accepting as true for the purposes of these proceedings only, on or about February 7, 1983, David Nathan Ascani was shot and killed by two New Orleans Police Department officers. Suit was commenced in the Civil District Court for the Parish of Orleans, State of Louisiana. Several plaintiffs, listed below, seek damages based upon various causes of action:

PLAINTIFF	RELATIONSHIP	CAUSE OF ACTION
Peter A. Ascani, Sr.	father of deceased	wrongful death
Peter A. Ascani, Sr.	father of deceased	survival action (mental and physical pain and suffering of David Nathan Ascani)
Six siblings	brothers/sisters	loss of freedom of association
Peter A. Ascani, Sr., on behalf of the Estate of David Nathan Ascani	none	mental and physical pain and suffering of David Nathan Ascani and loss of life

Defendants-respondents excepted to the claims for damages asserted by Peter A. Ascani, Sr., on behalf of the Estate of David Nathan Ascani, and the claims of the siblings of David Nathan Ascani for loss of freedom of association, for failure to state a claim recognized by law. The trial court dismissed these claims on June 11, 1984. The Louisiana Fourth Circuit Court of Appeal affirmed this decision on May 8, 1985. Writs were denied by the Louisiana Supreme Court on June 28, 1985.

ARGUMENT

I.

The Estate Of David Nathan Ascani Does Not Have A Cause Or Right Or Action Against Respondents.

The essential function of a peremptory exception of "no right of action" is to raise the question of whether a remedy afforded by law can be invoked by a particular plaintiff. *Henry v. State,* 435 So. 2d 565 (La. App. 3d Cir. 1985). The purpose of the peremptory exception of "no cause of action" is to test whether plaintiff's allegations entitle it to any remedy whatsoever at law. *McIlwain v. Manville Forest Products Corp.,* 416 So. 2d 954 (La. App. 2d Cir. 1982). The sole issue before the court in either case is whether the face of plaintiff's petition states a claim for relief recognized by law.

The Estate of David Nathan Ascani, appearing herein through Peter A. Ascani, Sr., seeks to assert a claim under Louisiana Civil Code art. 2315 and 42 U.S.C. 1983 for the violation of David Nathan Ascani's constitutional right to life. However, for the reasons set out herein, the Estate of David Nathan Ascani, as distinguished from certain relatives of the decedent, is without an action in law.

A. The Estate Of David Nathan Ascanti Does Not Have A Right Of Action Under Louisiana Or Federal Law.

One area of civil rights litigation not covered by federal law is that relating to the survival of Section 1983 actions upon the death of the plaintiff. *Robertson v. Wegmann,* 436 U.S. 584, 56 L.Ed.2d 554, 98 S.Ct. 1991 (1978). However, state statutes governing the survival of state actions do exist. This Court has held that pursuant to 42

U.S.C. 1988, applicable state law of survivorship provides the principal reference point in ascertaining the survival of civil rights actions. *Robertson, supra; Moor v. County of Alameda,* 411 U.S. 693, 36 L.Ed.2d 596, 93 S.Ct. 1785 (1973), *reh. den.* 412 U.S. 963, 37 L.Ed.2d 1012, 93 S.Ct. 2999, overruled on other grounds, *Monell v. Department of Social Services,* 436 U.S. 658, 56 L.Ed.2d 611, 98 S.Ct. 2018.

The intent of Congress to defer to state law in this regard was recognized in *Brazier v. Cherry,* 293 F.2d 401 (5th Cir. 1961); *cert. den.* 368 U.S. 921, 7 L.Ed.2d 136, 82 S.Ct. 243. *The Brazier* court noted at page 405 of its opinion:

> With a clear congressional policy to protect the life of the living from the hazard of death caused by unconstitutional deprivations of civil rights, where then do we find the statutory machinery to give effective redress after death?
>
> * * *
>
> (W)e are of the clear view that congress adopted as federal law the currently effective state law on the general right of survival. This was done by Section 1988. 293 F.2d 401 at 405.

In Louisiana, the applicable statute governing the survival of civil actions is Louisiana Civil Code art. 2315. Article 2315 represents the adoption of a statutory scheme wherein three separate and distinct classes of beneficiaries are entitled to seek recovery. These separate and mutually exclusive classes are:

1. The surviving spouse and child or children of the deceased;
2. The surviving mother and father of the deceased, if there is not a child or spouse surviving;

3. The surviving brothers and sisters of the deceased, if there is no spouse, child or parent surviving. La. Civ. Code art. 2315, *supra.*

The estate of the decedent is clearly precluded from seeking any type of recovery from any action arising from the death of an individual. The Louisiana Supreme Court has consistently held that the right of action created by Article 2315 may be exercised only by the beneficiaries enumerated in the statute, and that these classes of beneficiaries must be strictly construed. *Roche v. Big Moose Oil Field Truck Service,* 381 So. 2d 396, 399 (La. 1980).

However, Section 1988 contains a significant limitation in this regard, as state law may be applied only when it is "not inconsistent with the Constitution and laws of the United States." 42 U.S.C. Section 1988, *supra; Robertson, supra.*

Thus, the Louisiana survivorship scheme must pass constitutional muster before it may be properly engrafted onto Section 1983. In order to be consistent with federal law, *viz.* Section 1983, the applied state law must not frustrate the policies underlying federal law. *Robertson, supra.* The policy considerations of Section 1983 include compensation of persons injured by deprivations of federal rights and the prevention of abuses by those acting under the color of state law. *Robertson, supra; Carlson v. Green,* 446 U.S. 14, 64 L.Ed.2d 15, 100 S.Ct. 1468 (1980).

Louisiana Civil Code Article 2315 is not inconsistent with the Constitution or laws of United States so as to require the creation of a new rule recognizing the deceased's estate as a separate and distinct proper party plaintiff. Some states have chosen to vest the survival action with the administrator of the estate or the estate

itself; Louisiana has merely elected to vest this right with certain specified heirs of the deceased. This procedural difference between Louisiana and some other states does not render Article 2315 constitutionally defective. Moreover, the practical result of such a difference is negligible, since the proceeds of a judgment rendered in favor of "the estate" in a survival action will inevitably be distributed to the heirs of the deceased in accordance with the probate law of the particular state. Louisiana law simply eliminates a step from this process by allowing certain heirs themselves to bring the survival action.

Petitioner suffers absolutely no prejudice under Louisiana law, since the damages sought on behalf of the Estate of David Nathan Ascanti are recoverable by the proper class of beneficiaries under Article 2315. In fact, Peter A. Ascani, Sr., as the proper party plaintiff under Article 2315, presently has a claim before the Louisiana Trial Court for these very damages. Respondents do not contest the right of the father of the deceased to pursue the survival action. However, respondents vehemently object to petitioner's attempt to include the "Estate of David Nathan Ascani" as an additional party plaintiff. The recognition of such an additional party plaintiff would effectively create two survival actions for the death of one individual. Petitioner's attempt to bring a claim on behalf of the fictitious "Estate" amounts to a legal artifice designed to garner two damage recoveries from a single survival action. The Trial Court, Appellate Court and State Supreme Court refused to condone such legal maneuvering. It is respectfully submitted that this Court should also refuse to condone the same.

Additionally, this Court had an opportunity to examine and rule upon the sufficiency of the Article 2315 survivorship scheme in the context of a Section 1983 case in *Robertson, supra.* This Court concluded that Article 2315 passed constitutional muster and was not inconsistent with the Constitution and laws of the United States. This rationale was adopted by the Trial Court in its reasons for judgment:

> Section 1983 does not define who is "injured" by civil rights violations resulting in death. In this respect, 1983 is "deficient" and the categorized preferences established by Civil Code Article 2315 are appropriately engrafted onto 1983 by Section 1988, thereby excluding the estate and siblings as parties plaintiff. (*R.P.* 12).

Accordingly, it is respectfully submitted that under either a state or federal cause of action, the Estate of David Nathan Ascani has no right of action to seek damages arising out of the death of David Nathan Ascani.

B. The Estate Of David Nathan Ascani Does Not Have A Cause Of Action Under Louisiana Law Or A Claim Under Federal Law.

In addition to designating the classes of beneficiaries possessing the right to pursue an action arising out of the death of an individual, Loiusiana Civil Code art. 2315 specifies two separate and distinct bases of recovery. These avenues of redress are the survival action and wrongful death action. Louisiana Civil Code art. 2315. Each of these bases of recovery are known as a "cause of action" under Louisiana law. Petitioner, the Estate of David Nathan Ascani, now seeks to add a third basis of recovery, that being an action for "loss of life." This third basis of recovery has not been statutorily or judicially recog-

nized in Louisiana, for the reason that the damages sought under this novel claim are already available to petitioner through the survival and wrongful death actions. Moreover, this claim asserted on behalf of "the Estate" is not only redundant and repetitious; it constitutes a thinly veiled attempt to obtain a double recovery for a single allegedly wrongful act. It is respectfully submitted that because the compensatory scheme of Article 2315 does not frustrate the policies of Section 1983, this new basis of recovery should not be created or recognized in this action.

Petitioner argues that David Nathan Ascani's Section 1983 claim "abated" with his death. Petitioner's Jurisdictional Statement, pages 19, 28-29. This abatement allegedly frustrates the policies underlying Section 1983 because "it was actually to the advantage of the police officers to kill him (Ascani) rather than injure him." Petitioner's Jurisdictional Statement, page 11.

This argument is misconceived. First, the Section 1983 claim of David Nathan Ascani did not abate. Louisiana law insures that an action does not abate on the death of a party. Louisiana Code of Civil Procedure art. 428. If David Nathan Ascani had lived long enough to file suit, his father, as the sole member of the favored class of beneficiaries specified by Article 2315, could have been legally substituted as proper party plaintiff. Louisiana Code of Civil Procedure art. 801. Second, even in the absence of a suit, the cause of action of David Nathan Ascani survives. Ascani died before he could pursue his legal remedy. Nevertheless, Article 2315 preserves his action for the preferred beneficiaries. Peter A. Ascani, Sr. currently pursues this action in state court, in its entirety, just as if David Nathan Ascani were doing the same himself. Peter

A. Ascani, Sr. stands in the shoes of David Nathan Ascani. Clearly, it was not "to the advantage of the police officers to kill him rather than injure him."

Petitioner misappreciates the fact that the damage action of David Nathan Ascani has survived his death by virtue of the engraftment of Louisiana Civil Code art. 2315 upon 42 U.S.C. 1983, as provided by 42 U.S.C. Section 1988. Additionally, the damages sustained by Peter A. Ascani, Sr., in his individual capacity will be sufficiently addressed in his action for the wrongful death of his son. (See Summary of Claims, *supra*).

These two actions serve to sufficiently satisfy the policies of compensation and deterrence underlying Section 1983. In addition to the deceased's claim, which has survived in the person of Peter A. Ascani, Sr., the death of David Nathan Ascani has spawned a completely different action, that being the wrongful death suit of Peter A. Ascani, Sr. If David Nathan Ascani had survived, this action would not be maintainable. The death of David Nathan Ascani has drastically increased the defendants' potential liability exposure. Thus, by killing David Nathan Ascani, the defendants have exposed themselves to liability on two different fronts.

The case of *Bell v. City of Milwaukee*, 746 F.2d 1205 (6th Cir. 1984), involved facts very similar to those of the instant case. However, the applicable state law in *Bell* restricted non-pecuniary damages in wrongful death actions to a maximum of $25,000. The Court, after considering the magnitude of the wrongdoer's acts, held that it would be more consistent with federal policy to establish an additional basis of recovery for "loss of life" which

would not be subject to the statutory limitation. Petitioner in the instant case is not plagued with this restriction. Under Article 2315, the items of recovery (pecuniary, non-pecuniary, etc.) are merely exemplary; additionally, this statute is devoid of quantum limitations. This lack of limitations applies to both the survival and wrongful death actions. This aspect of the Louisiana compensatory scheme distinguishes this controversy from *Bell*. The nature of the Louisiana compensatory scheme, coupled with the availability of a wrongful death action in this particular case, clearly demonstrates that it was not "to the advantage of the police officers to kill him rather than injure him."

Furthermore, this controversy is distinguishable from *Bell* on other grounds. The Wisconsin survival scheme provides redress for damages inflicted upon the deceased during his lifetime. In *Bell*, the jury found that no deprivation of the deceased's constitutional rights had occurred prior to death. 746 F.2d at 1236, 1278-9. Additionally, the deceased's death was apparently instantaneous. 746 F.2d at 1215. Thus, under the facts of *Bell*, the deceased was not technically injured during his lifetime. Any claim for the civil rights violations inflicted upon the deceased abated. However, the factual circumstances of *Bell* are not presently before this Court. Louisiana law does not bar survival of David Nathan Ascani's Section 1983 claim. This cause of action survives in the person of Peter A. Ascani, Sr. The disposition of this claim is pending at this very moment in the Trial Court in Louisiana. Louisiana law has in no way impeded the ability of petitioner to seek redress for the civil rights violations allegedly inflicted upon David Nathan Ascani. Thus, *Bell* does not present persuasive authority in this instance. The instant case is also

distinguishable from *Jaco v. Bloechle*, 739 F.2d 239 (6th Cir. 1984) for exactly the same reasons stated hereinabove.

Petitioner is misled by his interpretation of the cases of *Carlson v. Green*, 446 U.S. 14, 64 L.Ed.2d 15, 100 S.Ct. 1468 (1980), and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 29 L.Ed.2d 619, 91 S.Ct. 1999 (1971). These cases apply only to the limited set of circumstances wherein a victim of a constitutional violation by a federal agent has a right to recover damages against the official in federal court, despite the absence of any statute conferring such a right.

The defendants in the instant case were acting under color of state law. Section 1983 provides a statutory avenue of redress in the latter situation. The victim's action is preserved by virtue of the adoption of the survivorship clause of Article 2315 through Section 1988. Thus, unlike the scenarios presented in *Carlson* and *Bivens*, there is no need for the creation of a new cause of action in order for a court to adequately address the alleged deprivation of constitutional rights, because one presently exists.

Under the facts of this case, Article 2315 is not inconsistent with the Constitution or laws of the United States so as to require the creation of a new rule recognizing the deceased's estate as a separate and distinct proper party plaintiff. Petitioner suffers no prejudice under Louisiana survivorship law, since the damages alleged for "loss of life" are recoverable through the pending survivorship or wrongful death actions, or both. Louisiana law provides ample bases for litigation of his claim to a just and equitable conclusion. Accordingly, it is respectfully submitted that under either state or federal law, the Estate of

David Nathan Ascani has no cause of action to seek damages arising out of the death of David Nathan Ascani.

II.

The Siblings Of David Nathan Ascani Do Not Possess A Claim For Loss Of Association With Their Brother.

Louisiana Civil Code art. 2315, *supra,* deprives the siblings of David Nathan Ascani of a cause of action against respondents, because any cause of action which does exist, exists only on behalf of the surviving father of David Nathan Ascani. Under the circumstances of this case, Louisiana law vests both the wrongful death and survival actions with the parent(s) of the deceased. Respondent adopts the arguments made in Part I of this Brief in this regard, as if copied *in extenso* herein. Alternatively, even assuming, *arguendo,* that a claim for loss of association exists, it would exist only in favor of Peter Ascani, Sr.; he abandoned this claim by not designating it or briefing it as an issue when this matter was appealed to the Louisiana Fourth Circuit Court of Appeal. Louisiana Rules of Court, Uniform Rules Courts of Appeal, Rule 2 Section 12.4, *supra.*

Moreover, the United States Seventh Circuit Court of Appeal recently presented compelling reasons which counsel against the recognition of such a right between brothers and sisters. In *Bell v. City of Milwaukee, supra,* the Court explained its holding as follows:

> Moreover, if we were to hold that the Federal Constitution entitles the siblings to recover for loss of society and companionship, there could be no principled way of limiting such a holding to the immediate family or perhaps, blood relatives. Obviously, many human relationships stem from the "emotional

> attachments that derive from the intimacy of daily association," but we are unwilling to attach constitutional significance to such attachments outside the closely guarded parent-child relationship. Plaintiff suggests we could limit a holding in their favor to blood relatives in the nuclear family . . . (but) such a holding would require us to wander without principled guidance in deciding which, if any, of a decedent's brothers, sisters, aunts, uncles, cousins, or even friends could recover under federal law for the deprivation of their association with decedent. 764 F.2d 1205, 1247.

In the present case, although an action for the deceased's wrongful death may descend to certain relatives, any such action cannot descend to the siblings of David Nathan Ascani, as they are pre-empted from filing suit under Louisiana Civil Code art. 2315. Furthermore, there is no constitutional right of association which would be redressed in a Section 1983 action arising out of the death of one's brother. Respondents suggest that the reference to "the party injured" in Section 1983 creates an action which may be exercised by the victim of a constitutional violation, or his survivor in the event of death. This language, respondents aver, creates a basis of redress for the victim of a civil rights violation; Section 1983 does not address the grievances of those with a related interest.

CONCLUSION

No claim for relief exists at law for the Estate or siblings of David Nathan Ascani in this case. Only the father of the deceased, Peter A. Ascani, Sr., has a right of action and cause of action for relief. He currently has both a survival action and wrongful death action

pending in Louisiana. These claims await disposition on the merits in state court. The afforded avenues of relief will fully redress any violation of the civil rights of David Nathan Ascani, if the trier of fact eventually concludes that such violations occurred. A denial of certiorari in this case will not prejudice, interfere with, or terminate either of these actions. Since there is no conflict between the law of Louisiana as set forth above, and the Constitution and laws of United States, it is respectfully submitted that the instant matter does not present this Court with a case which would merit a full briefing and argument on the issues presented.

Respectfully submitted,

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